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HILIRAN JUARA SDN BHD v. TENAGA NASIONAL BHD

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK JC
[CIVIL APPEAL NO: BA-12BNCvC-22-02-2020]
13 OCTOBER 2020

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UTILITIES: *Electricity – Charges – Claim against developer for usage at common facility of apartment project – Category of tariff – Whether residential or commercial – Whether electricity supplied for maintenance and management of common property and common facilities – Whether fall under commercial tariff*

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LIMITATION: *Action – Cause of action – Running account – Whether limitation period set in – Whether action barred by limitation*

The respondent ('TNB') claimed against appellant ('defendant') for a sum of RM277,494.85 being the outstanding and payable electricity bills as at
D 17 October 2018 issued to the defendant, the developer and registered consumer and account holder in respect of the electricity supply to the premises, a common facility in an apartment project comprising of 260 units of completed apartments. At the defendant's request, TNB filed and served further and better particulars of its claim. The defendant disputed the claim
E on the grounds that the claim (i) was not in compliance with the applicable laws/rules; (ii) was based on estimated readings; (iii) for late payment was in breach of the applicable legal provisions; (iv) was for compounded interest or interest on interest; and (v) for the amount and/or penalty and/or interest and/or late payment was barred by limitation under the Limitation Act 1953. The Sessions Court allowed the plaintiff's claim for the amount of
F RM273,475.23 and interest until full settlement and costs. Hence, this appeal by the defendant.

Held (dismissing appeal with costs):

(1) The category of tariff to be imposed by TNB on the supply of electricity
G to the premises was not determined by the category of land use under the National Land Code but rather by the activities carried out at the premises by the customer. The electricity supply was provided by TNB to the defendant for maintenance and management of the common property and common facilities in a completed development project
H with certificate of fitness for completion. Therefore, pursuant to TNB's tariff book, it was correct for the plaintiff to impose a commercial tariff on the defendant and there was nothing illegal about levying such commercial tariff rates for the premises. (paras 20, 21 & 26)

(2) The fact that the title to the premises and certificate of fitness described
I the building as residential building does not necessarily qualify the electricity supply to be given to every part of the building under the

domestic tariff. The lot occupied by the defendant was allocated for the management office which could not be considered as 'private dwelling' and the activities carried out therein were not activities usually carried out in a private dwelling but rather management, maintenance and administrative services. The defendant did not fall under the definition of 'domestic consumer' under s. 37(16) of the Electricity Supply Act 1990 and was thus a 'non-domestic consumer'. The management office and the common properties did not fall under the category of residential premises. Therefore, the imposition of the higher commercial tariff was correct and justified. (paras 20, 30 & 33)

(3) The contemporaneous bills and account statement showed that the account was a running account until May 2016. Amount due on a running account is a cause of action known to common law, and the limitation period did not set in. Therefore, the claims by TNB were not barred by limitation. (paras 39-41)

(4) Under s. 26A of the Electricity Supply Act 1990, TNB may impose surcharge for late payment at prescribed rates and in the premises, the defendant's argument against surcharge or late payment charges was rejected. (paras 42 & 44)

Case(s) referred to:

Bajaj Textiles Ltd v. Gian Singh & Company Ltd [1968] 1 LNS 11 FC ***(refd)***

Chee Kuat Fong & Ors v. Amalan Tepat Sdn Bhd & Anor And Another Appeal [2011] 3 CLJ 117 CA ***(refd)***

Poon Wai Mung v. Tenaga Nasional Bhd [2012] 1 LNS 712 HC ***(refd)***

Song Lian Chye & Ors v. Tai Kian Cheong [1983] 2 CLJ 128; [1983] CLJ (Rep) 375 FC ***(refd)***

Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd [2013] 1 CLJ 797 CA ***(refd)***

Legislation referred to:

Electricity Supply Act 1990, ss. 26A, 37(16)
Limitation Act 1953, s. 6(4)
Strata Management Act 2013, ss. 2, 9(4)(a), 15(1)(b)(i)

For the appellant - S Gurdial; M/s Gurdial Sohan & Co
For the respondent - Chong Kah Yee; M/s Shui Tai

Reported by S Barathi

JUDGMENT

Tee Geok Hock JC:

Background

[1] The plaintiff supplied electricity to the premises Tingkat G, Pangsapuri Anggerik, Jalan Serdang Lama, Taman Suria, Seri Kembangan, Selangor under the Account No. 220161404500. The premises were the common facilities in an apartment project which is comprised of 260 units of completed apartments ("the said premises").

[2] The defendant was at all material time the registered consumer and account holder in respect of electricity supply to the said premises. The defendant was also the developer of the said apartment project.

[3] The plaintiff claimed that as at 17 October 2018, a sum of RM277,494.85 was outstanding and payable under the electricity bills issued to the defendant under the said account. It also claimed interest and costs.

[4] At the defendant's request, the plaintiff filed and served further and better particular of its claim dated 10 January 2019 (see pp. 22 to 28 of rekod rayuan jilid 1; also marked as exh. P8 on pp. 389 to 394 of rekod rayuan jilid 3).

[5] The defendant was the developer for the housing project Pangsapuri Anggerik and had applied for the supply and connection of electricity to the said building. Hence, the electricity supply account was in the defendant's name.

[6] In August 2011, the said building and common property of the building was handed over to the JMB Pangsapuri Anggerik which was formed on 7 August 2011 under the Building and Common Property (Maintenance and Management) Act 2007. However, the electricity supply account remained registered under the defendant's name until many years thereafter until 2018. The defendant also failed or neglected to notify the plaintiff of that the defendant had quit the said premises.

[7] The JMB was brought in as a third party to the suit.

[8] The defendant disputed the plaintiff's claim on the following grounds:

(i) the said claim was not in compliance with the applicable laws/rules;

(ii) the claim was based on estimate readings;

(iii) the claim for late payment was in breach of the applicable legal provisions;

(iv) the claim was for compounded interest or interest on interest; and

(v) the claim for the amount and/or penalty and/or interest and/or late payment was barred by limitation under the Limitation Act 1953.

[9] After full trial, the Sessions Court allowed the plaintiff's claim for the amount of RM273,475.23, interest thereon at the rate of 5% p.a. from 18 October 2018 until full settlement and costs of RM10,000.

[10] Being dissatisfied with the Sessions Court's decision, the plaintiff has appealed to this court against the entirety of the Sessions Court's decision.

[11] In the defendant's memorandum of appeal and the supplementary memorandum of appeal, the following main grounds were raised:

(i) The learned Sessions Court Judge erred in law and in fact when she refused to take into account or take into consideration the issue of the illegality of the commercial tariff imposed by the plaintiff.

(ii) The learned Sessions Court Judge misdirected herself when she held that the defendant was estopped from challenging the commercial tariff.

(iii) The learned Sessions Court Judge erred in law and in fact when she allowed the claim for RM273,475.23 when the said sum:

(a) and/or the principal sum of RM229,194.19 had not been proved or established by the plaintiff;

(b) included charges for another unrelated and unpleaded account;

(c) included late payment charges or late payment interest of RM44,281.04 which was barred by limitation under s. 6(4) of the Limitation Act 1953 and/or was not proved by the plaintiff or admitted by the defendant and/or was not in compliance with the mandatory provisions under the Licensee Supply Regulations 1990;

(d) included charges based on estimated readings; and

(e) included compounded interest and/or overlapping charges;

(iv) The learned Sessions Court Judge also failed to consider that part of the plaintiff's claim was barred by limitation under the Limitation Act 1953.

(v) The learned trial judge's decision is null and void on ground of illegality or lack of jurisdiction.

[12] In the appeal, the appellant/defendant has raised the following main arguments and/or issues:

(i) illegality issue;

(ii) estoppel;

(iii) limitation period;

(iv) surcharge or late payment charges;

(v) proof of principal sum;

(vi) contents of exh. P8 must be proved;

(vii) compound interest;

(viii) overlapping charges;

(ix) unrelated and non-pleaded Account No. 01810010322002; and

(x) illegality and lack of jurisdiction.

A **Principle Of Appellate Intervention**

[13] It is trite that an appellate court should be slow to interfere with the finding of fact by a trial judge. In the case of *Song Lian Chye & Ors v. Tai Kian Cheong* [1983] 2 CLJ 128; [1983] CLJ (Rep) 375; [1983] 2 MLJ 222, the Federal Court held as follows:

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> The present appeal involves mainly finding of facts, and as such an appellate court should be slow to interfere. As stated by Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484 at 487 and quoted with approval recently by the Privy Council in *Kim Guan and Company Sendirian Berhad v. Yong Nyee Fan & Sons Sendirian Berhad* [1983] 2 MLJ 8:

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> > Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

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[14] A more recent Court of Appeal case of *Chee Kuat Fong & Ors v. Amalan Tepat Sdn Bhd & Anor And Another Appeal* [2011] 3 CLJ 117; [2010] MLJU 1662 held as follows:

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> The law on this is very clear. Unless there is obvious error in the reasoning to the findings of facts made by the learned trial Judge, the appellate court shall be very slow to interfere. As such there is no reason for us to exercise any appellate intervention the findings made.

[15] Our appellate courts have in numerous cases held that in considering
F whether or not to interfere with the trial court's findings of facts, the "plainly wrong" test should be applied.

[16] In considering this appeal, this court has applied the "plainly wrong" test in respect of trial court's findings of fact and also whether or not here is any error of law or principle in respect of the trial court's decision on
G questions of law.

Illegality Issue

[17] The appellant/defendant has submitted that the respondent/plaintiff's claim was based on the commercial tariff and such tariff was illegal when in
H fact and in law the residential charge should be applied. The appellant/defendant argued that the defendant was a domestic consumer who should be charged a domestic tariff, and not commercial tariff, under the laws. The appellant/defendant argued that the contract between the plaintiff and the defendant for levying electricity tariff at commercial rate is illegal for
I contravention of laws, namely, the National Land Code (NLC) and the category of land use thereunder.

[18] In response, the respondent/plaintiff has submitted that (i) the category of tariff to be levied on the supply of electricity to the said premises is not determined by the category of land use under NLC but rather by the activities carried out at the said premises by the customer; (ii) the provisions of the NLC are irrelevant to the plaintiff in respect of its supply of electricity to consumer; (iii) under the Electricity Supply Act 1990, the defendant is a non-domestic consumer in respect of the common property and common facilities; and (iv) there is nothing illegal about levy of commercial tariffs for electricity supply to management office, common property and common facilities.

[19] Before embarking on a discussion on the law and its application to the facts, it is pertinent to note the following macro factual background in our present case:

(i) in the said development, there are 260 units of residential apartments;

(ii) in addition to the 260 residential apartments, there is a management office and common property with common facilities;

(iii) upon the completion of the construction of the said development, the defendant/developer applied to the plaintiff/TNB for 264 separate electrical meters under domestic category of tariff and one electrical meter under non-domestic or commercial category of tariff;

(iv) the plaintiff/TNB approved the defendant/developer's application for connection and supply of electricity as per the defendant/developer's said application;

(v) the 264 electrical meters under domestic category of tariff were for separate supplies of electricity to the 260 units of residential apartments and parts of the common property; and

(vi) the one meter under non-domestic category of tariff was for the maintenance and management office and the common facilities ("the said premises").

[20] This court agrees with the respondent/defendant that the fact that the title to the premises and "sijil layak menduduki" described the building as residential building does not necessarily qualify the electricity supply to be given to every part of the building under the domestic tariff. The category of tariff to be imposed by the plaintiff on the supply of electricity to the said premise is not determined by the category of land use under the National Land Code but rather by the activities carried out at the said premises by the customer. The tariff book issued by TNB issued with the approval of the Electricity Commission (at p. 433 of RRBC J3) clearly provides as follows:

A (b) "DOMESTIC CONSUMER" means a customer occupying a **private dwelling** which is not used as a hotel, boarding house or used for the purpose of carrying out any form of business, trade, professional activities or services.

...

B (d) "COMMERCIAL CONSUMER" means, but not limited to, a consumer occupying or operating an office block, hotel, service apartment, boarding house, retail complex, shop-house, car-park, workshop, restaurant, estate, plantation, farm (except those categories defined in the Specific Agriculture Tariff), port, airport, railway installation, toll plaza, street lightings at tolled highway C including its bridges and tunnels, telecommunications installation, broadcasting installation, entertainment/recreation/sports outlet, golf course, school/educational institution, religious and welfare organization, military and government installation, hospital, waste treatment plant, district cooling plant, cold storage, warehouse, and D any other form of business or commercial activities which are not primarily involved in manufacturing, quarrying or mining activities.

(emphasis added)

[21] According to TNB's tariff book cited above, it is clear that domestic tariff is only accorded to a consumer occupying a private dwelling. The E defendant's witness SD2 in his testimony confirmed that the usage of the electricity supplied by the plaintiff to the defendant is "for the common utilities, namely lightings in the common area including staircases, lifts, corridors and the pump room and the management/maintenance office". This clearly shows that the defendant itself acknowledged that the electricity supplied by the plaintiff was not used for a private dwelling but instead for F an office and common utilities. Therefore, pursuant to the TNB's tariff book, it is correct for the plaintiff to impose a commercial tariff on the defendant for it is clear that the defendant did not fall within the definition of a domestic consumer.

G **[22]** In order to qualify as a domestic consumer and enjoy significantly low tariff, the defendant must be:

(i) occupying a private dwelling; and

(ii) that private dwelling is not used to carry out commercial or non-residential activities.

H **[23]** In respect of the said premises (ie, the management office, the common property and common facilities), the defendant cannot be said to have been occupying a private dwelling.

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[24] This court agrees with the respondent/plaintiff's submission that the provisions of the National Land Code are irrelevant to the plaintiff/TNB in respect of its supply of electricity to consumers. The plaintiff/TNB supplies electricity to consumers pursuant to the contract to supply. The plaintiff/TNB determines the applicable contractual tariff based the tariff rates approved and/or fixed by the Energy Commission as evidenced in the tariff book (pp. 430 to 448 of RRBC J3).

[25] The plaintiff is regulated by the Electricity Supply Act 1990 and not the National Land Code. The definitions in the tariff book do not refer to the category of land use but rather to the activities intended to be carried out by the consumer at the premises to be supplied. In other words, the criteria applied by the plaintiff in determining the contractual tariff for the supply is independent of the National Land Code. Any breach of the permitted land use is a matter between the owner of the land and the land authorities to the exclusion of the plaintiff. The law does not impose upon TNB an onerous and extraneous burden of having to investigate what is the category of land use for the premises, what are the relevant authorities' terms of approval for the premises/buildings, what is the manner and extent the consumers use or occupy the premises, whether or not the electricity consumers' use of the land or occupation of the premises in the manner and extent would contravene the provisions of the National Land Code or any other applicable statutes, etc.

[26] In the circumstances of our present case, the electricity supply was provided by the plaintiff/TNB to the defendant/developer for maintenance and management of the common property and common facilities in a completed development project with certificate fitness for completion, and there was nothing *ex facie* illegal about the plaintiff/TNB's supply of electricity to the said premises. As regards the tariff rates chargeable, the plaintiff/TNB used the rates according to the guidelines approved by the Electricity Commission and also according to the defendant/developer's application for electricity supply. There is nothing illegal about levying such commercial tariff rates for the said premises in the circumstances.

[27] Section 2 of the Strata Management Act 2013 ("SMA 2013") provides as follows:

> "common property"
>
> (a) in relation to a building or land intended for subdivision into parcels, means so much of the development area:
>
> (i) as is not comprised in any parcel or proposed parcel; and
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> (ii) used or capable of being used or enjoyed by occupiers of two or more parcels or proposed parcels; or

A (b) in relation to a subdivided building or land, means so much of the lot:

(i) as is not comprised in any parcel, including any accessory parcel, or any provisional block as shown in a certified strata plan; and

(ii) used or capable of being used or enjoyed by occupiers of two or more parcels;

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Section 9(4)(a) of the SMA 2013 provides that during the developer's management period, the developer shall ensure that a separate and distinct area is set aside out of the common property of the development area for the sole purpose of an administration office for carrying out the management and maintenance duties of the developer under the Act, and shall C subsequently hand over the administration office to the joint management body (JMB): s. 15(1)(b)(i).

[28] It is pertinent to note that the defendant's witnesses SD1 and SD2 admitted and confirmed that the electricity supplied by the plaintiff to the D defendant (and/or third party) at the said premises was for the purpose of the management office, lifts, water pump, corridors, staircase and lighting ("common properties") and not for private dwelling.

[29] Further, the sijil layak menduduki (certificate of fitness) issued by the Majlis Perbandaran Subang Jaya proved that there were only 260 units of E residential premises which was confirmed by SD1. As such, the management office was clearly not categorised as a residential premise which qualified for a supply of electricity at the lower domestic tariff.

[30] Since the management office and the common properties (ie, the electricity supplied by the plaintiff to the defendant) do not fall under the F category of residential premises, the imposition of the higher commercial tariff was correct and justified.

[31] The definition of non-domestic consumer is also provided in s. 37(16) of the Electricity Supply Act 1990:

G (16) For the purposes of subsection (3):

"domestic installation" means an installation in a private dwelling which is not used in any hotel or boarding house or for the purpose of carrying out any business, trade, profession or service;

"non-domestic consumer" means a consumer of electricity other than H domestic consumer;

"domestic consumer" means a consumer in domestic installation supplied or connected with electricity.

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[32] The definitions set out above clearly show that in order to qualify for the domestic tariff, the consumer must firstly be occupying a private dwelling and secondly, that the private dwelling is not used to conduct commercial activities. Only if these two qualifications are met that the consumer may be defined as a "domestic consumer". A

[33] The defendant did not fall under such definition by reason of the fact that the lot occupied by the defendant was allocated for the management office which cannot be considered as a "private dwelling" and the activities carried out therein are not activities usually carried out in a private dwelling but rather management, maintenance and administrative services. The management office and the common properties were being used for carrying out services other than as private dwelling. Since the defendant did not fall under the definition of "domestic consumer" then the defendant must fall under the definition of "non-domestic consumer" because a non-domestic consumer is anyone who is not a domestic consumer under the Electricity Supply Act 1990. B C D

[34] In light of the express provision of ss. 9(4)(a) and 15(1)(b)(i) in the specific statute in Strata Management Act 2013 which requires the developer in every strata development project, including strata residential development, to set aside an area of the common property for use as the administrative office and to hand over the same for the joint management body for their continuation of use as an administrative office, it cannot be argued that the use of such administrative office and its related services can constitute a contravention of the general provision on category of land use under the National Land Code. It is settled law that a special statute prevails over a general statute to the extent of any conflict or inconsistency. What is specifically authorised by the Strata Management Act 2013 enacted specially for strata development cannot be held to be in contravention of a general provision of the National Land Code, a general statute for lands generally. E F

[35] Even if one were to assume that the general provision of National Land Code on prohibition of use against the land use were to be applicable to the strata development here, there is still no contravention of the prohibition of the National Land Code. In determining whether the use of a land (in this context, the master title for the residential strata development) has contravened the category of land use under the National Land Code, the court has to consider the dominant use of the land comprised in the master title, and not to split hair by microscopic examination of whether a minimal or insignificant part thereof is being used for non-residential purpose. In the development project in our present case, 260 units of apartments are being used for residential purpose, while the administration/management office, G H I

which occupies a very small area of the project, is being used for non-residential. In the premises there is no factual basis whatsoever for arguing that the plaintiff/TNB's supply of electricity to the administrative/management office at the non-residential tariff rate could be illegal.

[36] In the course of my delivery of the oral judgment on 1 September 2020, I used an example to illustrate the application of this principle. In the example, I cited the situation of a lawyer who occupies his dwelling house as his residence and sets aside one room thereof as his study room where he also does his professional works including legal research, preparing for his court cases, contacting his clients, etc. It would be too far-fetched to argue that the lawyer has contravened the National Land Code prohibition on category of land use and his house is thereby at risk of forfeiture by the land authority. Similarly, a factory on industrial land with a guard house and its attached bedroom for the 24-hour security guard would not contravene the "industry" category of land use. Likewise, a farmer who resides at his small farmhouse built on a parcel of agricultural land where he also carries out his cultivation of crops does not have to worry about his agricultural land facing the risk of forfeiture by the State Authority for any alleged breach of category of land use.

[37] In the premises, this court agrees with the Sessions Court's decision that it is not illegal for the plaintiff/TNB to levy the administration/management office and the common facilities with commercial tariff rates in the project.

Issues Related To The Illegality Issue

[38] As this court has upheld the Sessions Court's decision on the legality of the plaintiff/TNB's levy of commercial tariff rates on the administration/management office and common facilities, it is not necessary for this court to delve into the issues on estoppel or lack of jurisdiction.

Limitation Period

[39] This court accepts the respondent/plaintiff's submission that amount due on a running account is a cause of action known to common law, and the limitation period did not set in. This was decided in *Bajaj Textiles Ltd v. Gian Singh & Company Ltd* [1968] 1 LNS 11 (Federal Court) and in *Poon Wai Mung v. Tenaga Nasional Bhd* [2012] 1 LNS 712 (Vernon Ong J (now FCJ)).

[40] This court finds no sufficient basis to interfere with the Sessions Court's finding of fact that the developer's account was at all material times a running account. Having perused the bills and statements issued in connection with this account, this court is satisfied that the Sessions Court's finding of running account is correct and justified. Among others, the following contemporaneous bills and account statement show that the account was a running account until May 2016:

RR3/3400:	Bil Terakhir	31/12/2014	RM179,624.70
	Bayaran Terakhir	12/11/2014	RM 4,000.00
	Caj semasa		RM 2,364.86
RR3/341:	Bil Terakhir	13/01/2015	RM182,270.35
	Bayaran Terakhir	12/11/2014	RM 4,000.00
RR3/343	Bil Terdahulu	(17.3.2015)	RM190,571.50
	Bayaran Akhir	(24.4.2015)	RM 4,000.00
	Caj Semasa		RM 2,319.99
RR3/373	Bil Terdahulu	17.10.2017	RM201,225.40
	Bayaran Terakhir	3.5.2016	.RM 6,000.00

[41] In the circumstances, this court agrees with the Sessions Court that on the facts of the present case the plaintiff/TNB's claims are not barred by Limitation Act 1953.

Surcharge Or Late Payment Charges

[42] Under s. 26A of the Electricity Supply Act 1990, TNB may impose surcharge for late payment at prescribed rates.

[43] TNB's statutory right to surcharge for late payment has been upheld by the Court of Appeal in *Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd* [2013] 1 CLJ 797.

[44] In the premises, this court rejects the appellant/defendant's argument against surcharge or late payment charges.

Issues On Proof Of Principal Sum, Exh. P8

[45] This court finds no valid or sufficient basis to interfere with the Sessions Court's findings of fact on proof of principal sum, exh. P8, compound interest and overlapping charges.

Conclusion

[46] By reason of the aforesaid, the appellant/defendant's appeal was dismissed with costs.

[47] After hearing both counsel's views on the quantum of costs, this court assessed the costs of appeal at RM5,000 subject to allocatur.